IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

DAVID J. GUENTHER, d/b/a J. DAVID'S CUSTOM CLOTHIERS, on behalf of himself and all others similarly situated,

Plaintiff,

v.

CROSSCHECK INC., a California Corporation; UNITED BANK CARD, INC., a New Jersey Corporation; and DOES 1 through 200, inclusive,

Defendants.
_____/

No. C 09-01106 WHA

**ORDER ON MOTION TO REMAND**

## INTRODUCTION

Plaintiff filed this proposed class action in Sonoma County Superior Court. Plaintiff alleges that he was fraudulently enrolled in defendant Crosscheck Inc.'s check-verification service without his knowledge and was then forced to pay termination fees and penalties to extricate himself. Defendants removed the action to federal court, and plaintiff now moves to remand seeking enforcement of a forum-selection clause. For the reasons stated below, plaintiff's motion to remand is **GRANTED**.

## STATEMENT

In this proposed class action, plaintiff David Guenther, d/b/a David's Custom Clothier, alleges that he was fraudulently enrolled as a subscriber in defendant Crosscheck Inc.'s check-verification service without his knowledge when he enrolled in co-defendant United Bank Card,

Inc.'s credit-card authorization service. The two defendants have a partnership whereby they combined their credit-card and check-authorization services. Plaintiff alleges that, when he discovered and attempted to cancel the undesired service, he was assessed "termination" penalties and fees. He filed suit in Sonoma County Superior Court on January 22, 2009, and filed an amended complaint soon thereafter. The amended complaint asserts claims on behalf of a putative nationwide class for (1) unjust enrichment, (2) money had and received, (3) fraud by concealment, (4) unfair business practices, and (5) RICO violations.

On March 14, 2009, defendants removed the case to federal court on the basis of diversity jurisdiction under the Class Action Fairness Act as well as federal-question jurisdiction. Plaintiff now moves to remand the case to state court. Plaintiff seeks enforcement of a forum-selection clause included in the contract plaintiff signed with defendant UBC for credit-card authorization service. The clause states the following (Br. Exh. A; emphasis added):

> XII. ***VENUE***: THIS AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF CALIFORNIA. ***THE PARTIES AGREE THAT ANY ACTION ARISING OUT OF THE NEGOTIATION, EXECUTION OR PERFORMANCE OF THE TERMS AND CONDITIONS OF THIS AGREEMENT SHALL BE BROUGHT IN THE COURTS OF SONOMA COUNTY, CALIFORNIA***. YOUR STORE(S) AGREES THAT THIS AGREEMENT WAS FORMED IN SONOMA COUNTY, CALIFORNIA UPON ACCEPTANCE BY AN OFFICER OF CHECK CENTER.

Plaintiff contends that the emphasized portion of this clause is a mandatory and enforceable forum-selection clause requiring that this case be litigated in the Sonoma County Superior Court.

**ANALYSIS**

"A contractual forum selection clause is prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances," for example, due to "fraud or undue influence underlying the forum selection clause." *Docksider, Ltd. v. Sea Technology, Ltd.*, 875 F.2d 762 (9th Cir. 1989). Where such a clause selects state

court as the appropriate forum and is mandatory rather than permissive, remand is required in order to enforce the clause. *Ibid.*[1]

Defendants make no allegation of fraud or undue influence nor otherwise challenge the enforceability of the forum-selection clause. Indeed, the forum-selection clause was included in the "terms and conditions" of defend UBC's own standard-form contract. This motion therefore concerns only the proper interpretation and scope of the clause. Plaintiff contends that the forum-selection clause is mandatory and that defendants have contracted away their removal rights. Defendants, in turn, contend that the clause (although mandatory as to place of initial filing) is permissive *as to removal*.

The parties' forum-selection clause governs "venue" and specifies that "any action" arising from the contract "shall be brought" in the courts of Sonoma County, California. This language is mandatory: the plain language of the clause requires litigation in the state courts of Sonoma County. Decisions regarding similarly worded forum-selection clauses confirm as much. *Air Ion Devices v. Air Ion*, 2002 WL 1482665 (N.D. Cal. 2002) (Illston, J.), for example, addressed the following virtually indistinguishable forum-selection clause:

> In the event AI has failed to meet its obligations under this agreement . . . then the parties agree that any action commenced by AID to enforce its rights against AI *shall be brought in the County of Marin, State of California* . . . .

Id. at *2 (emphasis added). Just like here, the clause stated that any action "shall" be "brought" in a particular state court. Judge Illston ruled that the clause was mandatory and required remand so that the action could be litigated in the specified state court.

Similarly, in *Docksider v. Sea Technology*, the Ninth Circuit ruled that the following forum-selection clause was mandatory rather than permissive (albeit in a motion to dismiss rather than to remand):

> Licensee hereby agrees and consents to the jurisdiction of the courts of the State of Virginia. *Venue of any action brought hereunder shall be deemed* to be in Gloucester County, Virginia.

[1] Unless otherwise noted, all internal quotations and citations are omitted from authority cited by this order.

875 F.2d 762, 763 (9th Cir. 1989) (emphasis added). The decision explained, "[t]his language requires enforcement . . . . This mandatory language makes clear that venue, the place of suit, lies exclusively in the designated county." Like here, the clause at issue in *Docksider* governed "venue" and provided that any action "brought" under the contract "shall" be in the courts of a particular county. Defendants' arguments in support of a different interpretation in this case are unpersuasive.

* * *

*First*, defendants focus on the forum-selection clause's use of the word "brought." They argue that the clause required only that plaintiffs had initially *filed* their claim in state court but not that the action *remain* — *i.e.*, actually be litigated — in state court. They argue, in other words, that the clause may have been mandatory with respect to the place of initial filing but was (and is) permissive *as to removal*. Although defendants offer an impressive volume of citations, none supports this interpretation of the clause.

Defendants rely on *Hunt Wesson Foods. v. Supreme Oil Company*, 817 F.2d 75 (9th Cir.1987). That decision ruled that the following contract language was permissive rather than mandatory and thus did not require remand: "[t]he courts of California, County of Orange, shall have jurisdiction over the parties in any action at law relating to the subject matter or the interpretation of this contract." *Id*. at 76. The decision explained that this clause contained no language rendering a particular forum *exclusive* and thus did not preclude jurisdiction in courts *other* than those of Orange County.

The clause in *Hunt Wesson* did not utilize the word "brought." Here, defendants nevertheless contend, "brought" should be interpreted narrowly — to refer only to the place of initial filing — because the clause contains no mandatory or exclusive language *as to removal*. In rejecting remand, however, *Hunt Wesson* distinguished a prior decision that had ordered remand based on the following language: "any dispute . . . *shall be brought* in either San Diego or Los Angeles County." *Hunt Wesson*, 817 F.2d at 77 (emphasis added). There, *Hunt Wesson* explained, "it [was] clear that the language mandate[d] more than that a particular court has jurisdiction. *The language mandate[d] that the designated courts [were] the only ones which*

*ha[d] jurisdiction*." *Id*. at 77–78 (emphasis added). Defendants own authority (binding here) therefore rejected its interpretation of the word "brought."

Defendants also rely on *Northern California District Council of Laborers v. Pittsburg-Des Moines Steel Company*, 69 F.3d 1034 (9th Cir. 1995). That decision concerned the following forum-selection clause:

> [a] decision of the Board of Adjustment ... or the decision of a permanent arbitrator shall be enforceable by a petition to confirm an arbitration award filed in the Superior Court of the City and County of San Francisco, State of California.

*Id*. at 1036. It ruled (relying on *Hunt Wesson*) that this language was permissive rather than mandatory, explaining that "[a]lthough the word 'shall' is a mandatory term, here it mandates nothing more than that the Orange County courts have jurisdiction." *Ibid*. The clause at issue in *Pittsburg-Des Moines Steel*, however, did not state that the action had to be "brought" in any particular forum. In fact, the decision actually hurts defendants' cause. It emphasized that the clause at issue "d[id] not contain additional language such as '*venue* ... shall be deemed to be in Gloucester County,' which, in *Docksider*, designated the state court as the exclusive forum." *Id*. at 1037 (emphasis added). Here, in contrast, the *title* of the contract provision at issue is "VENUE," and the clause proceeds direct the parties to Sonoma County.

Next, defendants cite *Green v. Moore*, 2006 WL 1638282 (W.D. Wash. 2006). That decision addressed a forum-selection clause that stated: "[a]ny lawsuit arising from this Agreement must be filed in Whatcom County Superior Court, Bellingham, Washington, USA." *Id*. at *1 (emphasis added). The decision evidently relied heavily on the word "filed." It explained, "[a]ccording to its plain language, the clause requires only filing, not litigation, in Whatcom County." *Id*. at *2. It proceeded, however, to contrast *Docksider* (among other decisions):

> [i]f plaintiff had intended for Whatcom County to have exclusive jurisdiction, he could have included that language in the Agreement. *See, e.g., . . . Docksider, Ltd. v. Sea Tech., Ltd.*, 875 F.2d 762, 764 (9th Cir.1989) (finding clause mandatory in stating that "venue of any action brought hereunder shall be deemed to be in Gloucester County, Virginia")

Here, like *Docksider*, the clause specifies "VENUE" and states that any action "shall" be "brought" in Sonoma County. To interpret the clause as defendants propose would be to read the word "venue" out of the provision.

Finally, defendants cite *Project Development Group v. Sonoma County Junior College District*, 2007 WL 2518034 (N.D. Cal. 2007) (Alsup, J.), but that decision addressed an entirely different forum-selection clause that expressly referred to "the appropriate state *or federal* court located in Sonoma County." Indeed, *Project Development Group* expressly contrasted *Air Ion* (quoted above), which ordered remand based on a clause that (like here) provided that any action "shall" be "brought" in state court. 2002 WL 1482665, at *2. In short, the law in this circuit forecloses defendants' argument that the word "brought" requires only that an action be *initially filed* in a particular forum but not that it *remain* or actually be litigated in that forum — particularly where (as here) the clause also specifies "venue."[2]

* * *

*Second*, defendants focus on the forum-selection clause's use of the word "courts" and argue that the plural form of that word must refer both to state *and* federal courts. Under this interpretation, even if the clause is mandatory it would permit litigation in either the state or federal court encompassing Sonoma County. Again, the authority is to the contrary.

The clause here at issue requires that any action be brought in the "courts *of* Sonoma County, California." The Northern District of California is not a court "of" Sonoma County, California. As a Fifth Circuit decision explained in rejecting a similar argument: "[f]ederal district courts may be *in* Texas, but they are not *of* Texas. Black's Law Dictionary defines 'of'

[2] Defendants offer yet further citations — they reference the Rutter Guide and two decisions cited therein. The first is *Pelleport Investors, Inc. v. Budco Quality Theatres*, Inc., 741 F.2d 273 (9th Cir. 1984), a decision that *did* require remand (finding a clause to contain mandatory language), and the second is *Dixon v. TSE Intern. Inc.*, 330 F.3d 396 (5th Cir. 2003), another decision that *did* require remand based on the following contract language: "The Courts of Texas, U.S.A., shall have jurisdiction over all controversies with respect to the execution, interpretation or performance of this Agreement, and the parties waive any other venue . . . ." Finally, defendants cite *John's Insulation v. Siska Construction*, 671 F. Supp. 289 (S.D.N.Y. 1987), which ordered remand based on the following clause: "any action hereunder shall be commenced in the Supreme Court of the State of New York." The clause there at issue, however, referred to where an action was "commence" rather than "brought;" the clause (unlike here) did not specify "venue" (and distinguished a decision that had); and in all respects could not trump the above-cited Ninth Circuit law.

as 'denoting that from which anything proceeds; indicating origin, source, descent' . . . ." *Dixon v. TSE Intern. Inc.*, 330 F.3d 396, 398 (5th Cir. 2003) (emphasis in original).

In support of its interpretation of the plural "courts," defendants cite *Project Development Group*, 2007 WL 2518034, but as explained, that decision concerned an entirely different forum-selection clause that expressly referred to "the appropriate state *or federal* court located in Sonoma County." It was not a case (like here) where the clause directed the parties (only) to the state courts "of" a particular county.[3] Defendants also cite *Merrell v. Renier*, 2006 WL 1587414 (W.D. Wash. 2006), but again, that decision (unlike here) addressed a clause that could be interpreted specifically to provide for federal or state court: "venue . . . will reside in the *United States and* in the county of residence of the non-breaching party." Here, in contrast, the clause allows suit only in the courts "of" Sonoma County. This order rejects defendants' expansive interpretation of the plural "courts."

* * *

*Third*, defendants argue that "plaintiff cannot attempt to enforce a forum selection clause in a contract he claims does not exist." Defendants contend that the crux of plaintiff's unjust-enrichment claim is that no valid contract existed between him and defendant CrossCheck (just between him and defendant United Bank Card). Defendants cite authority indicating that "[t]he settled rule is that one who would rescind for fraud or other reason cannot cling to the portion of the deal he deems favorable and reject the balance. He must rescind the contract as a whole or not at all." *Int'l Marble and Granite of Colo. v. Congress Financial Corp.*, 465 F. Supp. 2d 993, 1004 (C.D. Cal. 2006) (citation omitted). Moreover, defendants contend, unjust-enrichment claims generally require that no valid contract actually authorized the conduct underlying the alleged unjust enrichment — otherwise the enrichment would not be unjust.

Plaintiff's unjust-enrichment claim, however, does not prevent enforcement of the forum-selection clause. Plaintiff does not seek rescission or repudiation of the contract. The

[3] *Project Development Group* addressed whether the Northern District is "located in" Sonoma County given that there was no federal courthouse physically located there. It ruled that the Northern District *was* an appropriate court because it was the federal judicial district covering Sonoma. The decision was not confronted with the question here at issue because it interpreted a clause expressly including the parties to state *or* federal court in Sonoma County, not just the courts "of" Sonoma County.

portions of the complaint defendants emphasize do not claim that the contract is invalid but instead simply allege (for example) that defendants engaged in fraud or unfair business practices by "surreptitiously signing their customers up for defendant UBC's check authorization service" and taking money for it (or its termination) without disclosure.

True, plaintiff's theory must be that there was no valid contract with CrossCheck for the (unwanted) check-authorization service and ensuing termination fees, and/or that plaintiff was fraudulently induced to enter a contract for the service, but such a claim does not render the forum-selection clause un-enforceable. Plaintiff's theory, in effect, is that although plaintiff *did* contract with UBC for credit-card authorization service, the contract did not allow defendants to take his money for CrossCheck's different, undisclosed and unwanted check-verification service. When defendants did so they committed torts and other violations and thereby were unjustly enriched. As a decision of this district explained,

> the Ninth Circuit has found that forum selection clauses can be equally applied to contractual and tort causes of action where resolution of the tort claims relates to the interpretation of the contract. *See Manetti-Farrow, Inc. v. Gucci America*, 858 F.2d 509, 514 (9th Cir. 1988).

*Graham Technology Solutions v. Thinking Pictures*, 949 F. Supp. 1427, 1432–33 (N.D. Cal. 1997). The forum-selection clause is enforceable.

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*Fourth*, defendants contend that the policy or spirit behind the Class Action Fairness Act supports removal. CAFA gave federal courts "original" jurisdiction over class actions that satisfy certain criteria, but it did not give federal courts *exclusive* jurisdiction over this action. *See* 28 U.S.C. 1332(d). Defendants cite legislative history suggesting that Congress generally wanted to channel interstate class actions to federal court. Although CAFA may otherwise afford this Court jurisdiction, however, CAFA does not trump a valid, enforceable and mandatory forum-selection clause by which parties agreed to litigate in state court — at least, defendants cite no provision so providing nor any authority so suggesting. It is often the case that federal courts have jurisdiction yet decline to exercise it in the face of a valid forum-selection clause.

Finally, insofar as any lingering ambiguity remains about the proper interpretation of the forum-selection clause (a doubtful proposition), the Ninth Circuit has repeatedly emphasized that "where language is ambiguous the court should construe the language against the drafter of the contract" — including in forum-selection clauses. *Hunt Wesson*, 817 F.2d at 78. Here, defendants drafted the forum-selection clause: it was included in defendant UBC's own "Standard Guarantee Terms and Conditions." Thus, any ambiguity that persists regarding the clause must be construed against defendants, *i.e.*, in favor of remand. For all of these reasons, the parties' forum-selection clause requires remand.

**CONCLUSION**

For all of the above-stated reasons, plaintiff's motion to remand is **GRANTED**. Despite the fact that Attorney Wells did an excellent job and made the most of what material she had to work with, the case law is decidedly against the position of her client.

**IT IS SO ORDERED**.

Dated: April 30, 2009.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE